United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2204

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

JOHN GANGEMI, et al.,

Appellants,

-against-

SALVATORE SCLAFANI, etc., et al.,

Appellees

BRIEF OF APPELLEE NEW YORK
CITY BOARD OF ELECTIONS

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF OF APPELLEE NEW YORK CITY BOARD OF ELECTIONS

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THE FACTS AND STATEMENT OF THE CASE.

Appellants timely filed designating petitions with Appelle New York City Board of Elections, which contained a sufficient number of signatures to have their names placed on the ballot for the office of male and female committee persons of the Republican County Committee from the 49th Assembly District. Appellants also filed designating petitions for Republican State Committee person from Kings County.

Some signatures were on petitions which nominated appellants for both county and state committee person, the balance were on separate petitions.

Appellant Gangemi is listed as a candidate for county committee man from 25 different election districts within the 49th Assembly District; Mrs. DiCarlo is a candidate in three election districts within the 49th Election District.

Since a candidate may serve as county committee person from only one election district within the Assembly District of the candidates residence, candidacies in twenty-five such districts by Gangemi and three such districts by DiCarlo were incompitable. There was no incompatibility for the office of Republican State Committee person.

While there is no express statutory provision covering multiple candidacies, New York case law has held that if a prospective candidate can not serve in an office for which he seeks to be a candidate because of a pending candidacy for an incompatible position, then his name may not be placed on the

ballot for the incompatible position. This principal is expressed in the cases of Matter of Trongone v O'Rourke 68 Misc 2d 6, Ryan v. Murray 172 Misc 105.

The Board of Elections pursuant to the rule of Trongone and Ryan vacated the county committee candidacies of appellants in all but one election district. The State Committee candidacies were unaffected.

Opponents to the appellants for the positions in question filed objections with the Board of Elections and later commenced a special proceeding under Election Law section 330 (1) seeking to have appellants designating petitions declared completely void due to permeating fraud, alleging that it was fraudulent to induce the electorate to sign designating petitions for incompatible county committee positions and also that it was fraudulent to induce the electorate into signing a petition designating a candidate to serve on both State and county committee positions when in fact the candidate could serve with any reasonable degree of certainty only in the State committee position.

A full haring was held in Supreme Court, New York County at Special Term on the issue of fraud. At the hearing appellants stipulated that they knew they were listed on the county committee petitions for the multiple county committee candidacies. The issue of fraud was fully litigated, the court deciding that the petitions in question were not so permeated with fraud as to warrant their total invalidity .

On appeal the Appellate Division affirmed Special Term by a three to two majority.

The New York Court of Appeals reversed the decisions below on appeal, in a per curiam opinion and stated that they were changing the law:

> "...so much of the holdings in the Ryan and Trongone cases as permitted a single candidacy to survive are not to be followed."

Appellants then commenced an action in the United States Court for the Eastern District of New York making claims for relief on constitutional and federal statutory grounds.

Since Gangemi and DiCarlo, who were defendant respondents in the state court litigation and appeals, never raised the constitutional and federal statutroy grounds as defenses, these issues were not litigated in State Court and no appeal could lie directly to the United States Supreme Court, from the Court of Appeals.

It was also established that the Court of Appeals would not be able to hear a motion to reargue their decision based on constitutional and federal statutory grounds before the date of the ensuing election. Judge Wienstein in the District Court denied appellants application for preliminary relief and dismissed the complaint. Appeal was taken to this court by Gangemi and DiCarlo from this decision.

THE RULE THAT INABILITY TO SERVE IN OFFICE PREVENTS A CANDIDACY

The ultimate evil which the New York Court of Appeals seeks to avoid by the decision in Lufty v. Gangemi ____NY____, is the fraud perpetrated upon the electorate when a candidate knowingly or otherwise, files designating petitions for a place on the ballot for an office in which he cannot serve The fraud occurs when the voter signs a petition for a candidate who to the voters knowledge is not otherwise disqualified from holding office. As was said in Matter of Ryan v. Murray 172 Misc 105 which invalidated a candidacy for an office incompatible to other offices the candidate sought:

> "The practice here sought to be pursued would constitute a fraud upon the enrolled voters of the party in the election districts involved. Its prohibition while not specifically set forth in the Election Law, is implicit in that law system of party government for which the Election Law makes provision"

There is at present, likewise, no legislation which prevents appellants from running for more than one incompatible position or for a position in which they would be unable to serve, and the prohibition still results from judicial interpretation of the Election Law.

As the Court of Appeals notes in Matter of Burns v. Wiltse 303 N.Y. 319 at page 323:

> "'it does seem reasonable to suppose that the election machinery, which is run at such a great expense to the public is for the purpose of doing a useful and not a useless thing' (Matter of Lindgren 232 NY 59, 64; emphasis supplied) In other words an election under such circumstances would be a futility."

It has consistently been the position of the New York courts that a candidate unable to serve may not be place upon the ballot. (see Matter of Burns v. Wiltse 303 NY 319, where the New York County law forbade a county judge to hold any other county office, such as District Attorney; Ryan v. Murray 172 Misc 105 aff'd 257 App Div 1068, where it was held that the prohibition against serving in more than one election district as county committee man though not specifically proscribed in the Election Law was nevertheless prohibited due to incompatibility, Matter of Trougone v. O'Rourke et al 68 Misc 2d 6, aff'd 37 AD 2d 763, where it was held that the offices of male assembly district leader for different parts of the same election district were incompatible; Matter of Lindgren v. Board of Elections of the City of New York 232 NY 59 where it was held that a candidate incarcerated for a felony, which term of incarceration was to run beyond the election, was disabled from holding office and could not therefore be a candidate, People v. Purdy 154 NY 439, where it was held that the New York Town Law prohibited a trustee of a school district from holding the office of town supervisor.)

The rule that "ineligibility prevents a candidacy" is not being challenged on this appeal. What is being challenged is the change in judicial policy which formerly allowed a candidate who filed designating petitions for incompatible offices, to run in one of those positions. In the Lufty opinion the Court of Appeals held per curiam:

> "Since the multiplicity of inconsistent candidacies has been properly recognized as injurious to the rights of the electorate, and described as fraudulent and deceptive, and because here the multiplicity of inconsistent candidacies for the county committee was intentional, the dissenters at the Appellate Division were correct in concluding that respondents designating petitions should fail entirely."
>
> With this practice, and absent acceptable excuse or justification, the voters who signed the offending petitions must be assumed to have been misled as to the candidates intentions to serve as their representitives if designated and subsequently elected at the primary. Moreover the petitions were misleading in suggesting that the various candidates listed intended to run together. These irregularities were also harmful because those who signed were precluded by law from signing petitions for other candidates for the same office (Election § 136, Subd 8). Thus the petitions must be considered to have been permeated with the defect intentionaly introduced into them by the circulators and thos candidates who participated in the circulation. As a consequence this court agrees with

the dissenters at the Appellate Division in this case that so much of the holdings in the Ryan and Trongone cases as permitted a single candidacy to survive are not to be followed."

POINT I

SECTION 5 OF THE VOTING RIGHTS ACT SHOULD NOT BE APPLIED TO STATE COURT DECISIONS

Section 5 of the Voting Rights Act, 42 U.S.C. §§1973c, applies to State-imposed action in regard to changes in the electoralpprocess and has no application to practices or procedures implemented pursuant to a federal court order. Section 1973c, as amended declares:

> "[w]henever a State or political subdivision***shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment***."

Section 1973aa-1 (h) of the Voting Rights Act, as amended, defines a state as follows:

> "The term 'State' as used in this section includes each of the several states and the District of Columbia."

In Connor v. Johnson, 402 U.S. 690, 691 (1971) the United States Supreme Court, held that a decree of a United States District Court is not within the reach of § 5 of the Voting Rights Act. Although

dissenting from the majority holding in Conner, supra., Justice Black clearly put this issue to rest when he declared:

> "Needless to say I completely agree with the holding of the majority that a reapportionment plan formulated and ordered by a federal district court need not be approved by the United States Attorney General or the United States District Court for the District of Columbia. Under our constitutional system it would be strange indeed to construe § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. § 1973c (1964 ed., Supp V), to require the actions of a federal court be stayed and reviewed by the Attorney General or the United States District Court for the District of Columbia," 695 (emphasis added.)

It is apparent that in enacting 42 U.S.C. §1973c, relating to approval of changes in voting procedures, Congress did not intend to give the executive branch, through the Attorney General the right to veto a decree of a district court, when such court is possessed of broad powers to protect the constitutional rights of litigants seeking its protection. Conner v. Johnson, supra; Conner v. Board of Supervisors of Oktibbeha County, 334 F. Supp. 280 (D.C. Miss. 1971); See also Sheffield v. County Board of Supervisors, 439 F. 2d 35 (5th Cir., 1971).

The Voting Rights Act of 1965 applies to New York State and specifically to Kings County, wherein the designating petitions in question were circulated, Rosario v. Rockefeller 410 US 752 36 Led 2d 1, 93 S Ct 1245. However to hold the voting rights act applicable to state court decisions is to create an undue hardship on state courts and in state election proceedings. Under the voting rights act proposed changes in voting procedures need not be acted upon by the Attorney General for a period of sixty days. It would indeed be a travesty of the judicial system for a court, such as the Court of Appeals to ask its litigants to wait for the Attorney Genera;'s approval of its opinion. The very reason which prompted Judge Wienstein to assume jurisdiction in the district court was the unavailablity of reargument in the Court of Appeals before the election.

Appellees do not contend that the congress can't legislate in pursuance of the Fourteenth and Fifteenth Amendments and that such legislation, if constitutional binds the state legislatures and courts. Appellees do question the right of congress to clothe the Attorney General with veto power over state court decisions. It would seem that the doctrine of Connor v. Johnson, supra which holds that Section 5 of the 1965 voting rights act is inapplicable to federal courts should also be extended to state courts.

The case of Powell v. Power 46 F 2d 84 requires that in

order for the provisions of the voting rights act to apply, a claim of racial discrimination must be advanced. The Powell case dealt with voting procedure changes made by the New York City Board of Election, an executive branch of the New York State Government. It is appellee's contention that the Powell doctrine does not properly dispose of the issue of whether the Voting Rights Act is to be applied to State Court Decisions. Appellee's, New York City Board of Elections contend that the Voting Rights Act should not be so applied.

POINT II

THE ABSTENTION DOCTRINE SHOULD BE APPLIED UNTIL STATE ELECTION PROCEEDINGS HAVE BEEN COMPLETED

Federal Constitution and statutory defenses to the relief requested against Gangemi and DiCarlo were not raised by appellants in the State courts. However it is crystal clear that had Appellee Lufty been given the relief he sought in the state court, a change in the Ryan and Trongone rules would have been necessary. Nevertheless appellants waited until they had lost in the state court, after three chances at litigation, to interpose the federal objections in the District Court. The appropriate procedure for appellants should have been a motion for reargument in the Court of Appeals so as to present constitutional and federal statutory defenses. Appeal would then lie directly to the United States Supreme Court. Unquestionably this is the preferred procedure in this type of case. As Judge Wienstein notes in Gangemi v. Sclafani in the opinion below:

> "There is strong reason to abstain in these election cases while state proceedings are completed. The New York Election Law is extremely complicated and the scheme is so interrelated that any change in any single part of the law may have widespread implications and create great difficulties in administration. Moreover the New York State Courts have over the years developed procedures which permit extremely rapid disposition on the merits and appeals to the highest court of the state within

> hours or days. The expertise of the Board of Elections and the state courts in these matters is far greater than could be acquired by the federal court which intervenes spasmodically."

The thrust of the abstention doctrine is that federal courts should, "stay their hand," until the highest court in the state has had a chance to decide the case. Texas v. Pullman Co. 312 US 496 61 S Ct. 643 85 Led 791; Burford v. Sun Oil Co. 319 US 315, 63 S Ct. 1098 97 Led 1424. However Judge Wienstein at the hearing on November 4, 1974, upon learning that the Court of Appeals would be unable to hear reargument until after the date of the primary election; September 10, 1974, decided that the abstention doctrine should not be applied. It is appellees contention that an effective remedy was available to appellants after the primary day election in the form of a special election, which is obviously the remedy left at this point should appellants position prevail.

Abstention, therefore, would not as in Dombrowski v. Pfister 380 US 479 85 S Ct 1116 14 L Ed 2d 22 leave appellants without an effective remedy. Also, respondents do not contest the rule that available state judicial remedies need not be exhausted as a prerequisite to a civil rights action under 42 USC §1983. However when a case is presently pending in a state court, as this case was in the Court of Appeals, and where as here appellants so, "belatedly learned" of their constitutional and federal statutory defenses, abstention is a most appropriate alternative.

To rule otherwise is to allow appellants three chances to litigate their claim in the state courts, and then add a possible further three chances in the federal system. This appeal to the United States Court of Appeals for the Second Circuit represents the fifth chance appellant has had to litigate the merits.

All of this lingering litigation against a background of urgency to meet an election timetable creates a very difficult situation for the Board of Elections.

POINT III

THE DISTRICT COURT WAS CORRECT IN FINDING THAT APPELLANTS FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED

The bulk of the cases concerned with voting rights and Fourteenth Amendment Equal Protection Clause rights, relate to disenfranchisement of the voter. Harper v. Virginia Board of Elections 383 US 663, 86 S. Ct. 1079, 16 Led 2d 169, declaring the Virginia poll tax unconstitutional, Kramer v. Union Free School District, 395 US 621, 89 S. Ct 1886, 23 Led 2d 583; wherein §2012 of the New York Education Law which provided that only property owners and parents of children in public school could vote in the school district election, was unconstitutional; Cipriano v. Houma, 395 US 701, 89 S Ct 1897 23 Led 2d 647 wherein a Louisiana statute providing that only property taxpayers had the right to vote in elections called to approve the issueance of revenue bonds by a municipal utility was unconstitutional.

However, the case of Williams v. Rhodes 393 US 23, 89 S Ct 5, 21 Led 2d 69, deals with denial of a candidates access to a place on the ballot.

The Supreme Court of the United States in the case of Williams v. Rhodes 393 US 23 holds at page 30:

> "It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our constitution, but we have also held many times that invidious distinctions cannot be enacted without a violation of the Equal Protection Clause."

The Supreme Court has further held in Dunn v. Blumstein 405 US 330 at page 334:

> "To decide whether a law violates the Equal Protection Clause, we look, in essence to three things: the character of the classification in question; the individuals interest in the classification; and the governmental interests asserted in support of the classification. Cf Williams v. Rhodes 393 US 23, 30 (1968)" emphasis supplied.

Dunn v. Blumstein, supra also established the rule that denial of the franchise must advance a compelling state interest by the least drastic means.

A. THE COMPELLING STATE INTEREST...

On this appeal the court is confronted by appellants contention that appellants were denied, and that those who signed appellants designating petitions were denied their rights under the constitution when appellants were removed from the ballot.

Their claim is that they were denied access to the ballot without the state showing that a compelling state interest was advanced by the least drastic means and that such action violates their Fourteenth Amendment, Equal Protection Clause rights.

They also claim that to deny the electorate a chance to vote for the candidates of their choice deprives the electorate of the right to associate for the advancement of their political beliefs, and to cast their votes effectively. This First Amendment right protects the electorate from federal encroachment and by virtue of the Fourteenth Amendment is also applicable to the states.

Both of appellants claims relate to Fourteenth Amendment, Equal Protection Clause rights. Appellants were denied their place on the ballot because of a fraud they had perpetrated upon the electorate. It has long been the rule in New York that a designating petition which is rife and permeated with fraud, is invalid. (See e.g. Haas v. Costigan 14 AD 2d 809, aff'd 10 NY 2d 889;) (for a more complete discussion on the invalidity of a designating petition due to fraud see Gassman, Election Law, Decisions and Procedure page 250 §49.) Clearly, "fraud" upon the electorate as a grounds for denial of a place on the ballot is not a basis of invidious discrimination between two classes of people. It is a distinction, the effects of which one may easily avoid by choice and is not a distinction based upon any inherent characteristic of the population.

It is also interesting to note that denial of a appellants claim place on the ballot, thereby denied the signers of their petitions the chance to vote for the candidates of their choice and to associate for the furtherance of their political beliefs. Appellants by their own action of soliciting signatures for offices for which they could not run, THEMSELVES denied the electorate of a meaningful chance to express their political

preference by the ballot.

It should also be noted that the signatures designating appellants for both county and state committee person were signed on the same petition in some instances. Therefore, anyone who signed a petition for an invalid county committee candidacy also signed a petition for a state committee candidacy. It cannot be seriously questioned that the states interest in protecting the electorate from fraudulent campaign tactics is indeed compelling.

B. "...BY THE LEAST DRASTIC MEANS"

Fraud was in this case knowingly perpetrated upon the electorate. To permit any candidacy designated in these peti[illegible] to survive, is to leave open for future use by unscrupulous c[illegible]e seekers the same options given in Ryan and Trongone. Clearly the only way to prevent such an abuse is to invalidate any petition which is tainted by this kind of fraud. It would be a difficult task indeed to inquire of every designating petition signatory whether he signed to promote the valid or invalid candidacy or both. Complete invalidation is not only the least drastic means, it is the only means of advancing this compelling interest.

CONCLUSION

FOR THE ABOVE STATED REASONS THE DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK SHOULD BE AFFIRMED

Respectfully Submitted
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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Wellesley P Allen III being duly sworn, says that on the 10th day of October 1974, he served the annexed Brief upon ~~Esq.~~, the attorney for the Appellants & Intervenor herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at ~~No.~~ in the Borough of , City of New York, being the address within the State theretofore designated by him for that purpose.

~~Sworn to before me, this~~
day of 19

Wellesley P Allen III

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